IN THE

Supreme Court of the United States

October Term, 1963

No. 86

UNITED STATES OF AMERICA,

Petitioner,

v.

KENNETH LEROY BEHRENS

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

AND

No. 31

BENJAMIN W. COREY,

Petitioner,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF OF THE LEGAL AID SOCIETY AS *AMICUS CURIAE*

LEON B. POLSKY
100 Centre Street
New York 13, New York
Counsel for the Legal Aid Society, Amicus Curiae

INDEX

TABLE OF CASES

IN THE

Supreme Court of the United States

October Term, 1963

No. 86

UNITED STATES OF AMERICA,

Petitioner,

v.

KENNETH LEROY BEHRENS

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

AND

No. 31

BENJAMIN W. COREY,

Petitioner,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF OF THE LEGAL AID SOCIETY AS *AMICUS CURIAE*

Statement of Interest

This brief *amicus curiae* is submitted with the consent of the parties in *United States* v. *Corey* (No. 31) and *Behrens* v. *United States* (No. 86).

The Legal Aid Society is a non-profit organization incorporated under the laws of the State of New York for the purpose of providing legal assistance for those unable to afford an attorney. The Criminal Branch operates in the state courts of the five counties of New York City and the United States District Courts for the Southern and Eastern Districts of New York. In 1962 the Society, by its counsel, was assigned to represent 757 defendants in the Southern District and 264 defendants in the Eastern District of New York. The Society was also assigned to 22 appeals to the United States Court of Appeals for the Second Circuit.

Because the United States, in its brief in *Behrens* (at pp. 26-29) indicates that the disposition here should be dispositive of *United States* v. *Johnson*, 315 F. 2d 714 (2d Cir.) certiorari pending, No. 123, O. T. 1963, wherein the Society represents the respondent Johnson, we submit this brief in an effort to assist the Court in arriving at the most appropriate disposition of these cases.

Statement

Both *Corey* and *Behrens* present one basic question for the Court's determination: When is the sentence imposed in a Section 4208 proceeding? If the action of the trial court upon receipt of the Section 4208 (c) report is *the* sentence then the presence of the defendant is required

under Rule 43, Federal Rules of Criminal Procedure and the defendant's time to take an appeal then begins to run. If the commitment under Section 4208 (b) is *the* sentence then the time to appeal begins to run from that date and the subsequent action on the Section 4208 (c) report is not within the mandatory ambit of Rule 43.

ARGUMENT

The time within which to file a notice of appeal cannot run from the Section 4208 (b) commitment.

This question is squarely posed by *Corey* and the prior proceeding in *Behrens* (190 F. Supp. 799 (S. D. Ind.)).

A. If the Government is correct in its contentions then Congress has either enacted a statute with which it is impossible to comply or has repealed, *sub silencio*, the well settled rule that the filing of a notice of appeal deprives the trial court of jurisdiction to modify sentence while appellate proceedings are pending.

If a notice of appeal is filed within ten days after the commitment then the district court may not modify or reduce sentence within the three months (extendable to six) required by Section 4208 (b) unless the court of appeals has affirmed and this Court denied certiorari.* *United States* v. *Grabina*, 309 F. 2d 783 (2d Cir. 1962) cert. den. 374 U. S. 836 (1963).

---

* No valid analogy can be made with the suspended sentence cases where appeal must be taken upon imposition, not after revocation. There the revocation is punishment for post-conviction conduct. Also, if the rule were otherwise, a defendant would be deprived of his right to appeal during the period of his good behavior.

B. Under the Government's position the defendant would have to elect to take his appeal before he would know what sentence he was going to have to serve. Since length of sentence is a major factor—often the most important—in the determination of whether or not an appeal should be taken, the defense may be forced to take an appeal which might otherwise not have been taken had it known what sentence would be imposed. Since the Record on Appeal must be filed in the court of appeals within forty days of the notice of appeal (Rule 39, Fed. R. Cr. P.), the defendant, or the Government in a *forma pauperis* case, will have had to pay for the transcription of the trial minutes in a case where the appeal may not be prosecuted in the event a light sentence is imposed.

C. A legal sentence imposed by a trial judge is generally unreviewable by the courts of appeals. However in some situations the exercise of the trial judge's discretion has been reviewed. See, *e.g.*, *United States* v. *Wiley*, 278 F. 2d 500 (7th Cir. 1960). If the Government is correct then a court of appeals will be unable to review the sentence on those rare occasions where review is desirable and permissible.

Under the Government's theory, perhaps review of the sentence can be had on a separate appeal after the trial court acts on the 4208 (c) report. This would result in two separate appeals and pose an almost insurmountable problem of communication if the represented or unrepresented prisoner is expected to file his notice of appeal within ten days from the final district court action. It would also involve a reassessment of the rule that no appeal lies from an order reducing sentence.

D. Assuming the appeal from a conviction to be perfected prior to the final action by the district court, then the court of appeals will have to decide the appeal without the benefit of knowing the term of imprisonment which the appellant must serve.

In a case where a defendant has been convicted on several counts, appellate courts will not generally review claims of error as to one count if a concurrent sentence is imposed on an unchallenged count. Yet, under *Corey*, the court of appeals would have to decide the appeal without knowing whether consecutive or concurrent sentences would be imposed and presumably would have to consider the merits of claims which it would not consider had the district court imposed concurrent sentences.

The defendant should be present at the time the trial court acts upon the Section 4208 (c) report.

Under Rule 43, Federal Rules of Criminal Procedure, a defendant must be present at the time of sentence and also must be afforded the right of allocution (Rule 32 (a), Federal Rules of Criminal Procedure). Presence at sentence is regarded as such a highly favored right that Rule 43 does not provide for its waiver in felony cases although specific provision is made for the voluntary waiver of the right to be present at other stages of the proceeding.

A. The action by the district court in committing a defendant to the custody of the Attorney General for study and report is "deemed to be for the maximum sentence . . ." Yet what happens if no report is made within the three or six month term and no further action is taken

by the district court? May the Attorney General hold the prisoner for the "deemed" maximum sentence? Clearly not, for the "commitment" expires of its own weight if no further action is taken by the trial court. Such an incomplete proceeding certainly does not add up to the "sentence" necessary to complete the court's judgment.

If it is necessary to take refuge in legislative history to determine the meaning and effect of the disputed portions of the statute it becomes even more apparent that the "deemed to be" provision was intended to meet certain real or imagined constitutional objections to what in substance is an administrative commitment by a judicial officer.

The references to the Committee testimony of the late Judge Parker (Govt's Brief in *Behrens*, No. 86, pp. 20-21) clearly demonstrates concern regarding whether an unsentenced defendant may be held in a federal penitentiary and whether problems might be presented by "increase" in the duration of confinement. It was to meet this concern that the "deemed to be" language was enacted.

B. Further support of legislative intent to enact the procedures demanded by the courts of appeals in *Behrens* and *Johnson* is found in the last sentence of Section 4208 (h) which provides: "The term of the sentence shall run from the date of original commitment under this section."

This provision would be completely unnecessary if *the* sentence was the initial commitment under Section 4208 (b). Only if the action on the report would be *the* sentence would the *nunc pro tunc* provision have any meaning. That the draftsmen found it necessary to spell out that the defendant was to receive credit is clear indication that the initial commitment was not intended to be the sentence.

C. Perhaps the major objection to the construction urged by the Government is that it just does not meet the realities of the situation.

The Government urges (at p. 33 of its brief in *Behrens*) that a defendant may make a full allocution at the time of the initial commitment and that it is unnecessary to recall him again to repeat his plea for leniency. This misses the point of the allocution. Allocution is not just the saying of some words by the defendant. It also involves the consideration of those words by the sentencing judge reasonably contemporaneous with the imposition of sentence. If the defendant is given the opportunity to speak only at the time of the initial commitment, his avowal of penitence or plea for leniency will be meaningless for a Section 4208 commitment requires none of the soul searching and reflection by the trial judge that is required by the imposition of a final sentence. Some three or six months later the court will have, for the first time, to seriously consider how long the defendant is to remain imprisoned. By that time the defendant is probably no more than a name on a piece of paper and the sentencing judge can hardly obtain the "feel" of the case by a review of his notes, the record and the various reports. If the right of allocution is to be effective, then the defendant should be present and allowed to speak at the only time anything he says would be meaningful.

Conclusion

For the foregoing reasons the judgment of the Court of Appeals for the Seventh Circuit should be affirmed and the judgment of the Court of Appeals for the First Circuit reversed.

Respectfully submitted,

LEON B. POLSKY
Counsel for the Legal Aid Society,
Amicus Curiae